IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 10TH JULY 2007 / 19TH ASHADHA 1929

SA.No. 485 of 1992(G)

AGAINST THE ORDER DATED 19/11/1991 IN AS.60/1988 of DISTRICT COURT,PATHANAMTHITTA.
O.S. NO.360/1980 OF MUNSIFF COURT , THIRUVALLA.
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APPELLANTS: RESPONDENTS 1 TO 3 DEFENDANTS 1 TO 3

***1. ANNAMMA MATHEW,**
SANKARAMANAGALATHU HOUSE,
PALIYEKKARA MURI, THIRUVALLA. (DIED)

2. GEORGE MATHEW OF DO. DO.

3. SARASU GEORGE OF DO. DO.

SUPPL.4TH APPELLANT IMPLEADED.

4. MATHEW GEORGE SANKARAMANAGALATHU,
PALIYAKARA MURI, THIRUVALLA.
SUPLEMANTAL 4TH APPELLANT IS IMPLEADED AS PER ORDER DT.31.5.199 IN CMP. NO.1817/1995.

BY ADV.SRI. M.C.SEN (SENIOR)
BY SMT.PREETHY KARUNAKARAN
SRI.R.RAJESH KORMATH

RESPONDENTS: APPELLANTS AND RESPONDENTS 4, 6 AND 7/
---------- PLAINTIFF AND DEFENDANTS 4,6 AND 7.

1. GEORGE VARKEY, SANKARAMANAGALATHU HOUSE,
PALIYEKKARA MURI, THIRUVALLA.

2. THOMAS MATHEW, NAITHALLOOR MANNIL,
MADATHUMBHAGAM, THEKKEKARA MURI,
PURAMATTOM VILLAGE.

SA. NO.485/1992

3. MARIAMMA JOSEPH, KOLLAMALA HOUSE, AMALLOOR MURI, THIRUVALLA.

4. THOMAS C.ALEX, CHARUM KUZHIKKAL HOUSE, ANIKKAD MURI, ANIKKAD VILLAGE REP.BY POWER- OF ATTORNEY HOLDER T.T.VARGHES, THAIKKAKATHU HOUSE, PALIYEKKARA MURI, THIRUVALLA.

BY ADV. SRI.R.RAMADAS- R1

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 10/07/2007, ALONG WITH SA NO. 270 OF 1992 SA NO. 498 OF 1992 SA NO. 381 OF 1992 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A.Nos.485/92,498/92,381/92
&270/92

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Dated this the 10th day of July, 2007

JUDGMENT

Defendants 1 to 3 in O.S.360/1980 are the appellants in S.A.485/1992. Defendants 4 to 7 in O.S.360/1980 are the appellants in S.A.270/1992. Plaintiff in that suit is the first respondent and other defendants are the other respondents. S.A.381/1992 was filed by the plaintiffs in O.S.330/1980 who are defendants 1 and 3 in O.S. 360 of 1980 and S.A.498/1992 by the plaintiff in O.S.171/1980 who is the first defendant in O.S.360 of 1980. The plaint schedule property in O.S.330/1980 and O.S.171/1980 are the northern portion and plaint schedule property in O.S.360/1980 is the southern portion of the property which originally belonged to Varkey George and Varkey Mathai. It was divided under Ext.A1 partition deed along with the other co-ownership properties. As per Ext.A1, the plot having an

extent of 3 acres 22 ¾ cents in survey No.121/16, 120/1 of Thiruvalla village was equally divided between Varkey George and Varkey Mathai. 1 acre 61 cents and 375 square links being the northern and southern halves were allotted respectively to Varkey George and Varkey Mathai. The northern plot was allotted to Varkey Mathai who was also known as C.V.Mathai and southern half was allotted to Varkey George. Respondent is the son of Varkey George. First appellant is the widow of Varkey Mathai and second appellant their son and third appellant, the wife of second appellant. Respondents 2 to 4 who are defendants 4 to 7 are the assignees of appellants 1 to 3 of portions of the northern property allotted to Varkey Mathai under Ext.A1. Contending that while first respondent was employed at Libya appellants encroached upon a portion of the southern plot allotted to Varkey George by putting up a temporary fence and succeeded in getting a draft resurvey plan prepared by the surveyor, first respondent originally filed

O.S.175/1980 a suit for fixation of the boundary. First respondent also filed an appeal before Superintendent of Survey, Alappuzha against the draft survey plan. Ext.A2 survey plan was then prepared by which a portion of the property belonging to first respondent was found to be in the possession of appellants. First respondent submitted Ext.A16 petition in that suit with a prayer to struck off the suit as he has already filed O.S.360/1980 a comprehensive suit for recovery of possession. Under Ext.A17 order the suit was struck off as prayed for in Ext.A16. In O.S.360/1980 first respondent sought a decree for recovery of possession on the strength of title contending that a small portion being the northern eastern portion of plaint schedule property was trespassed upon and is in the unlawful possession of appellants and he is entitled to get a decree for recovery of possession. Appellants had filed O.S.171/1980 and O.S.330/1980 contending that though a boundary with granite barbed fence was

there separating their property from the property of first respondent, first respondent attempted to remove earth causing the destruction of boundary fence and therefore first respondent is to be restrained by a permanent prohibitory injunction. All the suits were jointly tried. DW5, the Commissioner was appointed who prepared Ext.C1 to C4 reports and plan with the assistance of DW4, the surveyor . On the evidence of Pws. 1 to 5, Dws. 1 to 11 and Exts.A1 to A17 and B1 to B11, learned Munsiff dismissed O.S.360/1980 and granted a decree for injunction in O.S.171/1980 and O.S.330/1980 holding that first respondent is not entitled to the decree for recovery of possession and appellants are entitled to continue in possession of the property as demarcated by the Commissioner. The decree and judgment were respectively challenged in A.S.60/1988, 61/1988 and 62/1988 before District Court, Pathanamthitta. Learned District Judge on reappreciation of evidence found that the property allotted to Varkey

George is the southern plot P D E F G H I J as demarcated by the Commissioner and the property allotted to Varkey Mathai is the northern plot A B C D P K and the yellow coloured L M N O D P plot which is the plaint schedule property in O.S.360/1980 is in the possession of appellant. Learned District Judge also found that under Ext.A1 the yellow colored portion is part of the northern P D E F G H I J plot and first respondent has title to the disputed plot L M N O D P and appellants have no right to continue in possession of the same and granted a decree for recovery of possession of the said plot. O.S.360/1980 was decreed and O.S.330/1980 and 171/1980 were dismissed. S.A. 270/1992 was filed by defendants 4 to 7 and S.A.485/1992 was filed by defendants 1 to 3 challenging the decree granted in O.S.360/1980. S.A.381/1992 was filed challenging the dismissal of O.S.330/1980 and S.A.498/1992 was filed challenging the dismissal of O.S.171/1980. The following substantial questions of law were

formulated in the appeals.

1) When first respondent has by his admission in Exts.B1 and B3 admitted that northern boundary of the property assigned by him is the property sold by appellants under Exts.B2 and B4 and B8 and B9, whether first respondent is entitled to claim title to the property which lies to the north of the property sold under Exts.B2 and B3?

2) Whether courts below were justified in granting a decree on the basis of Ext.C2 plan?

2. Learned Senior counsel appearing for appellants argued that evidence and admission of first respondent establish that properties allotted to Varkey George and Varkey Mathai were separated by a permanent boundary wall through out the northern boundary of property of Varkey George and Exts.B1 and B3 sale deeds executed by first respondent also establish that the property which lies to the north of the property sold by first respondent is the property sold by appellants to defendants 4 to 7 and therefore courts below

should have found that first respondent has no title to the property which lies to the north of L M N O line. It was argued that first respondent under Ext.B1, B3 and registered sale deed 464/06 dated 13-2-2006 sold the entire southern plot allotted under Ext.A1 and the northern boundary shown in those documents are the property belonging to Varkey Mathai and devolved on appellants and sold by them and therefore first respondent cannot claim any property in the possession of appellants and so the decree for recovery of possession granted by first appellate court is unsustainable. It was argued that as per the plaint, plaint schedule property which is alleged to be the trespassed portion, is a triangular portion and not a funnel shaped portion as demarcated by the Commissioner and the fact that northern boundary of the property sold by respondents under Exts.B1 and B3 are the property sold by appellants under Exts.B2 and B4 establish that first respondent has no title to the disputed portion of the property

and hence the decree is unsustainable. Relying on the decision of the High Court of Madras in **Rangayyan v. Innasimuthu (AIR 1956 Madras 226)** and **K.Muneyya & Co. v. K.Varadarajulu (AIR 1964 A.P.17)**it was argued that the admission in a document executed by a party is binding on him and it is a substantive evidence which is binding on him and in the light of the admissions in Exts.B1 and B3 first respondent is not entitled to claim title over the disputed plot. Relying on the decision of the Apex Court in **Union of India v. Moksh Builders & Financiers Ltd (AIR 1977 SC 409)** it was argued that an admission by a party is a substantive evidence of the fact admitted, and admissions duly proved are admissible evidence irrespective of the fact whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case, it made a statement contrary to those admissions. Relying on the

registration copy of registered sale deed 464 of 2006 executed by first respondent on 13.2.1986 in favour of Somarajan and Padma Somarajan which was produced along with I.A.1577/2006, an application under Rule 27 of Order XL1 of Code of Civil Procedure to receive it as additional evidence, it was aruged by learned Senior counsel that as per the recitals in that document, respondent did not have any other property left with him and the northern boundary of the property sold thereunder is the property sold by appellants and in the possession of their assignees and therefore first respondent has no title to the disputed portion of the property which lies to the north of the properties sold under Exts.B1, B3 and the additional document and hence the decree granted is unsustainable.

3. Learned counsel appearing for first respondent argued that there is no admission in Ext.B1 or B3 or additional document produced by appellants and in any case an admission will not

create title and therefore on the ground of alleged admission, the decree granted by first appellate court cannot be interfered with. Learned counsel also argued that first appellate court has rightly found that first respondent has title to the plot P D E F G H I J and unless that title is lost by adverse possession and limitation, first respondent is entitled to the decree for recovery of possession of plot L M N O D P, which is a portion of plot P D E F G H I J and therefore there is no reason to interfere with the decree and no substantial question of law as such is involved in the appeal.

4. Both the appellants and respondent are claiming right and title to the property under very same Ext.A1 partition deed. Under Ext.A1, property having an extent of 3.22 ¾ acre was divided equally. The southern 1 acre 61 cents and 375 square link plot was allotted to Varkey George and the northern plot having the same extent was allotted to Varkey Mathai. In the light of Ext.A1,

appellants are not entitled to contend that what was allotted to Varkey Mathai was more extent or that plot allotted to Varkey George was having lesser extent. The Commissioner demarcated the property divided under Ext.A1 in Ext. C2 plan. Plot A B C D P K is the southern plot allotted to Varkey George having an extent of 1 acre 61 cents and 375 sq. links. Similarly property allotted to Varkey Mathai was demarcated as plot P D E F G H I J having the same extent. If the demarcation of property is correct, then the disputed plot L M N O D P which is in the possession of the appellants, is part of the plot A B C D P K allotted to Varkey George and first respondent has title to the said property. Ext.A2 is the rough survey plan prepared by the surveyor which has not become final. Ext.C2 plan is in accordance with Ext.A2 plan. First appellate court found that unless the property is demarcated as shown in Ext.A2 and C2 plan, the property cannot be divided equally as per Ext.A1. The first appellate court on

appreciating the evidence found that property allotted to Varkey George being the southern plot is plot A B C D P K and the property allotted to Varkey Mathai is the northern plot P D E F G H I J. I find no reason to interfere with that factual finding of the first appellate court. If that be so, first respondent has title to the disputed plot as found by the first appellate court.

5. The question then is whether that right has been lost either by the admission as canvassed by learned senior counsel or by adverse possession. It is trite that an admission will not create title to the property. If appellants have no title to the property which lies to the north of L M N O line the admission of first respondent by itself that the propety to the north of the property sold by him belongs to appellants will not create title to the disputed property unless they have title to the property otherwise. Though it was vehemently argued that there is admission in Ext.B1 and B3 with regard to title of appellants or want of

title on first respondent, in view of the reference made to the northern boundary, as rightly pointed out by learned counsel appearing for first respondent, though reference is made to the assignments made by the appellants in respect of northern property, there is no admission either with regard to the title of appellants to the disputed property or absence of title for first respondent. What was referred in the document are about the property to the northern boundary of the property sold under Ext.B1 and B3. Before appreciating the effect of that admission, it is to be born in mind that both Ext.B1 and B3 were executed subsequent to the institution of suit where first respondent sought a decree for recovery of possession of the property admitting the possession of the appellants to that property contending that they are portions of the property trespassed upon by the appellants and its title vest on first respondent. The recitals about the the northern boundary in the sale deeds are that

property sold by the brother of the father of the executant. True those properties are covered under Ext.B2, B4, B8 and B9. But there is no admission that brother of the father of the executant has title to the property sold or that their assignees have title. Therefore reference about the sale deeds executed by appellants in respect of northern property and that too in respect of the property for which first respondent had already instituted a suit claiming a decree for recovery of possession, cannot be termed as a substantive admission about the title of appellants. Similarly the additional document relied on by appellants do not contain an admission about the title of appellants or their assignees. What is recited in that document is also that the property sold thereunder to Somarajan and his wife is the property left with first respondent and that is enclosed within the compound wall. There is no admission that apart from that property, first respondent has no other property left with him.

True, the document does not make mention of the appeal pending or the right and title of first respondent upheld by the first appellate court. But that by itself will not either divest the title of first respondent or vest that title on appellants. Therefore on that ground also, appellants are not entitled to contend that first respondent has no title to the property. The admissions in the plaint in O.S.330/1980 and O.S.171/1980 establish that the temporary boundary fence separating the properties of appellants and first respondent was in fact fixed only two years prior to the institution of the suit. Therefore possession from that date of the disputed plot would not enable the appellants to claim title to the property either on the strength of Ext.A1 or by adverse possession. It is true that as per the plaint in O.S.360/1980 plaint schedule property is only a triangular plot on the north eastern portion of the property. But first appellate court has granted the decree forrecovery

of possession of plot L M N O D P as demarcated in Ext.C2 plan and therefore the identity of the property also cannot be disputed. The first appellate court appreciated the evidence and found that first respondent has title to the disputed plot and granted a decree for recovery of possession. In view of that decree the other two suits filed by appellants were dismissed. I find no reason to interfere with the decree and judgment passed by the first appellate court. There is no merit in the appeals. Hence all the appeals are dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NOS.485/92,498/92,
381/92 & 270 /92

JUDGMENT

10TH JULY,,2007